

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX**

CHEMTURA CORPORATION

Employer/Petitioner

and

Case 6-UC-481

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY, ALLIED
INDUSTRIAL AND SERVICE WORKERS
INTERNATIONAL UNION, AFL-CIO, CLC

Union

REGIONAL DIRECTOR'S DECISION AND ORDER

The Employer, Chemtura Corporation, is engaged in the manufacture and non-retail sale of specialty chemicals used primarily in various types of plastics, at its Morgantown, West Virginia, facility, the sole facility involved herein, where it currently employs approximately 129 employees. This case arises from the Employer's petition to clarify a unit of production and maintenance employees to exclude operational engineering assistants (OEAs) and mechanical engineering assistants (MEAs)¹ on the ground of their putative supervisory status. A hearing officer of the Board held a hearing and the parties filed timely briefs with me.²

By a Decision and Direction of Election dated April 11, 2006, in Case 6-RC-12511, I found, consistent with the position taken by the Employer in that matter, that United Steel, Paper

¹ MEAs are also referred to as maintenance engineering assistants.

² The hearing in this matter was closed on January 24, 2007, subject to the receipt of Employer Exhibits 7A through 12A which were to be transcriptions of Employer Exhibits 7 through 12. On February 22, 2007, the Employer's Motion for the Admission of Employer Exhibits 7A through 12A was received at the Regional Office. In its Motion, the Employer states the Union maintains its objection to the relevancy of Exhibits 7 through 12, but acknowledges that Exhibits 7A through 12A are satisfactory equivalents to their handwritten counterparts. Inasmuch as there is no dispute that Employer Exhibits 7A through 12A are satisfactory equivalents to Exhibits that were previously received into the record, Employer Exhibits 7A through 12A are received.

and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, herein called the Union, failed to meet its burden of showing that the OEAs and MEAs are statutory supervisors. Neither party requested review of that Decision. After an election was conducted, at which a majority of the valid votes counted were cast in favor of the Union, the Union was certified on May 16, 2006, as the exclusive collective-bargaining representative of the unit, which included OEAs and MEAs.

Although the Employer contended in Case 6-RC-12511 that the OEAs and MEAs were nonsupervisory employees who must be included in the unit, the Employer now argues, based on the Board's recent refined interpretation of Section 2(11) of the Act set forth in its decisions in Oakwood Healthcare, Inc., 348 NLRB No. 37; Croft Metals, Inc., 348 NLRB No. 38; and Golden Crest Healthcare Center, 348 NLRB No. 39 (Sept. 29, 2006), that the OEAs and MEAs are supervisors within the meaning of the Act. On November 22, 2006, the Acting Regional Director issued an Order to Show Cause related to the issue of whether the Employer would be permitted to revisit and relitigate the issue of the supervisory status of the OEAs and MEAs.

On December 13, 2006, the Region received responses from the Employer and the Union to the Order to Show Cause and, based on the arguments and assertions made by the Employer, I determined, without prejudice to any possible final resolution of the issues raised by the Order to Show Cause, that a hearing in this matter should be held and that the transcript, exhibits, parties' briefs and the Decision and Direction of Election in Case 6-RC-12511, at which the supervisory status of the OEAs and MEAs was previously litigated, should be made part of the record in this proceeding.

The Employer and the Union disagree on both the procedural and substantive issues in this case. The Union, contrary to the Employer, argues that the petition should be dismissed on the basis that, in the circumstances of this case, relitigation of the supervisory issue cannot be permitted by the filing of a unit clarification petition. The Union further argues that if the petition

is not dismissed on procedural grounds, it must be dismissed based on the Employer's failure to establish the supervisory status of the OEAs and MEAs.

As to the merits, at the hearing and in its brief, the Employer asserts that the OEAs and MEAs are statutory supervisors based solely on their assignment of work, responsible direction of work and having accountability for performing supervisory duties for a sufficient percentage of their time.³

I have considered the evidence and the arguments presented by the parties at the hearing and in their briefs, and have concluded based thereon, in agreement with the Union, that the Employer failed to demonstrate either a change in circumstances or a sufficient change in the law so as to warrant a clarification of the certified unit.⁴ As to the merits, after applying the standards set forth in Oakwood, Golden Crest and Croft Metals, I have concluded that the Employer has failed to satisfy its burden of establishing that the OEAs and MEAs are statutory supervisors. Therefore, I have dismissed the unit clarification petition.

I. PROCEDURAL ISSUES

In its Brief and in its pre-hearing Response to the Order to Show Cause, the Employer argued that in Oakwood, Golden Crest and Croft Metals, the Board revised its standards for determining supervisory status and that these decisions represent such a significant change in Board precedent that a unit clarification proceeding is appropriate to determine the supervisory status of individuals whose supervisory status was litigated less than one year ago. The Employer cites The Washington Post Company, 254 NLRB 168, 169 (1981), for the proposition that "[W]hen presented with an appropriate petition or claim, [the Board] is required to exclude positions from a bargaining unit where the inclusion of those positions would violate the

³ The Employer confirmed at the hearing that it is not relying on any other indicia of supervisory authority set forth in Section 2(11) of the Act.

⁴ I also note that if a clarification were warranted, my consideration of the issue would be limited to the indicia the Board discussed in Oakwood.

principles of the Act.” The Washington Post Company is inapposite here. In that case, the regional director, during the representation proceeding, expressly authorized the parties to raise the supervisory issue by filing a post-election unit clarification petition in exchange for the parties’ agreement not to litigate the unit placement issue prior to the election. In the instant case, the parties litigated the status of the OEAs and the MEAs less than one year before the filing of the instant unit clarification petition. Moreover, in Premier Living Center, 331 NLRB 123 (2000), involving a unit clarification proceeding, the Board relied upon its decision in I.O.O. F. Home of Ohio, Inc., infra, in rejecting the contention that the Board is required to determine the supervisory status of job classifications in a bargaining unit any time the issue is raised.

In I.O.O.F. Home of Ohio, Inc., 322 NLRB 921, 922-923 (1997), the Board reaffirmed its longstanding rule that in the absence of newly-discovered and previously unavailable evidence or special circumstances, an employer may not challenge the validity of a union’s certification based on a belief that unit members are statutory supervisors if it failed to raise the issue during a representation proceeding. The Board also noted that the courts have held that where, as here, an employer honors a certification and recognizes and begins bargaining with a certified representative, it waives a contention that the election and certification are invalid. *Id.* at 922, fn. 6. In both Premier Living Center and I.O.O.F. Home of Ohio, Inc., the Board specifically overruled prior cases in which parties were permitted to litigate supervisory issues despite prior stipulations concerning such matters, and distinguished The Washington Post Company from those cases on the basis that it involved express authorization by a regional director that resolution of the supervisory issue could be deferred to a post-election unit clarification proceeding.

Here, the supervisory status of the OEAs and MEAs was fully litigated and decided in Case 6-RC-12511. In that proceeding, the Union contended that the OEAs and MEAs were supervisors within the meaning of the Act, and thus excluded from the appropriate unit, because they had the authority, inter alia, to assign and to responsibly direct certain of the Employer’s

employees. In that proceeding, the Employer submitted evidence to establish and argued that the OEAs and MEAs had no such authority. Based on the record evidence I concluded, in accordance with the position advanced by the Employer, that the OEAs and MEAs were not supervisors within the meaning of Section 2(11) of the Act. Thus, I included them in the bargaining unit found appropriate therein. Neither party requested review of this determination despite the fact that the Board had publicly announced that it was reconsidering its decisions concerning supervisory status under Section 2(11) of the Act in light of the Supreme Court's decision in NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001),⁵ and this issue remained pending before the Board at the time of the original hearing and decision in this matter.⁶

As noted in Premier Living Center, supra, there may be cases such as Parkview Manor, 321 NLRB 477 (1996), where special circumstances can be demonstrated which would warrant the re-examination of the conclusions reached because of a change in the law. However, in Parkview Manor, the circumstances involved the application of a mode of analysis, the patient care analysis, which was used to determine that certain individuals were not supervisors. This patient care analysis was then expressly rejected by the United States Supreme Court in NLRB v. Health Care & Retirement Corp., 511 U.S. 571 (1994). In its Brief and Response to the Region's Order to Show Cause, the Employer, apparently arguing that special circumstances exist warranting relitigation of the supervisory issues in this case, stated that "given the breadth and scope of the changes wrought by the Oakwood decision," the rationale behind the Decision and Direction in Case 6-RC-12511 "cannot be accepted as consistent with current law. . . ." The Employer notes that the Board acknowledged that the Oakwood decision would lead to a remand of no fewer than 45 cases pending before it. The Employer also asserts that "the mere

⁵ NLRB Press Release R-2501 (7/25/03) "Labor Board Invites Briefs To Be Filed In Three Pending *Kentucky River* Cases."

⁶ NLRB Press Release R-2596 (7/13/06), "Statement of National Labor Relations Board Regarding 'Kentucky River' Cases."

fact that the remanded cases remained pending before the Board at the time Oakwood was decided as opposed to [Case 6-RC-12511], which had been concluded, is irrelevant.”

Initially, I find, in agreement with the Union, that the issuance of the Oakwood, Golden Crest and Croft Metals decisions does not constitute special circumstances so as to render a unit clarification proceeding appropriate in the circumstances of this case.⁷

Unlike the result in Parkview Manor, 321 NLRB 477 (1996), in which the Board permitted relitigation of the supervisory issue due to the Supreme Court’s decision in Health Care & Retirement Corp., supra, the findings in the underlying Decision and Direction of Election herein are not predicated upon a now discredited mode of analysis.⁸ In Oakwood, the Board refined, but did not change, its analysis for assessing supervisory status in light of the Supreme Court’s decision in NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001), by adopting definitions for the terms “assign,” “responsibly to direct,” and “independent judgment.” In addition, contrary to the Employer’s assertion, the fact that neither party filed a request for review of the Decision and Direction of Election in this matter is of critical relevance. In New Jersey Mfg. Extension Program, Inc., 337 NLRB 1256 (2002), the Board noted that the failure to file a request for review and the failure to file objections to the conduct of the election amounted to a failure to exhaust administrative remedies. Thus, the Board would not entertain a challenge to the appropriateness of the unit, which the employer alleged included managerial employees.

In this case, the parties failed to exhaust their administrative remedies. The parties proceeded to an election, which resulted in the certification of the Union as the representative of the employees in a unit found appropriate, and the parties then commenced bargaining. Absent special circumstances not present here, the Employer is not now permitted to raise the issue of the supervisory status of classifications that were litigated in the underlying representation case.

⁷ A change in the law does not automatically render appropriate a unit clarification petition. See Kaiser Foundation Hospitals, 337 NLRB 1061 (2002); Caesar’s Palace, 209 NLRB 950 (1974).

⁸ The Employer does not assert, nor does the record reveal any newly discovered and previously unavailable evidence relating to the duties and authorities of the OEAs and MEAs.

Assuming it were determined that, as a result of the refined analysis brought about by Oakwood, special circumstances existed warranting a unit clarification proceeding in this matter, then the inquiry would have to be limited to whether the OEAs and MEAs assign or responsibly direct employees while using independent judgment in accordance with the refined analysis announced in Oakwood, Golden Crest and Croft Metals. Were I to examine this case on the merits, I would conclude as set forth below that the Employer failed to meet its burden of establishing the supervisory status of the OEAs and MEAs.

II. OVERVIEW AND RELEVANT FACTUAL BACKGROUND

In 2003, the Employer acquired the Morgantown facility, which had been operated for more than 30 years by a series of predecessor employers, the most recent of which was Crompton Corporation.⁹

The Employer manufactures liquid and solid chemicals, the majority of which are used by plastics companies. The Employer's production process involves generating chemical reactions on various raw materials to create the desired product. Solely involved herein is the Morgantown, West Virginia, facility. The Morgantown facility consists of a North plant and a South plant, which are separated by a distance of approximately one mile. Production operations are carried on in five buildings at the North plant and one building at the South plant. The Employer's production areas operate 24 hours per day, 7 days per week. The production areas at the North plant are referred to as the K-9 area, the PMHA area, and the 181/183/74

⁹ The record establishes that the facility was first owned by Westin Corporation, followed by Borg Warner, G.E. Specialty Chemicals, Inc., and then Crompton Corporation. The record also establishes that the Employer is a combination of Crompton Corporation and an entity identified in the record as Great Lakes.

area.¹⁰ At the South plant, the production area is located in the S-11 building. In this area, plasticizers are manufactured.¹¹

The overall operations of the Employer are the responsibility of site manager Brian Macconnachie. Reporting to Macconnachie are Liquids Manager Bill Hayes and Solids Manager Steve Suek. Reporting to Liquids Manager Hayes are North plant liquids team leader Martin Thorn and the South plant team leader Wendell “JR” O’Hearn. Reporting to Solids Manager Suek is PMHA and K-9 team leader Mike Sirockman.

Reporting to team leader Thorn at the 181/183/74 area in the North plant are OEA John I. Clawges and 16 production technicians. South plant liquids team leader Wendell “JR” O’Hearn supervises OEA Joe Swihart and approximately 12 production technicians working in the S-11 area. Production of solids takes place only at the North plant in the PMHA and K-9 areas. Team leader Mike Sirockman oversees PMHA area OEA Harry Areford and K-9 area OEA Debbie Foley and the 18 technicians who work in those areas.

Facilities Operations Manager Lynn Unger reports directly to Macconnachie. Unger oversees three MEAs and approximately 16 mechanical maintenance technicians. The MEAs working at the North plant and their assigned areas are Bruce Trickett in the 181/183/74 area and Dave McDilda in the K-9 and PMHA areas. MEA Blaine Bolyard works at the South plant.

Because the Employer’s facility is in constant operation, the production and maintenance technicians work 12-hour rotating shifts.¹² On this schedule each shift grouping of approximately five production technicians and three to four maintenance technicians works on

¹⁰ 181, 183 and 174 are separate buildings at the North plant. The record reveals that building 174 is commonly referred to as 74. The Employer considers the operations in 181, 183 and 74 to be one production area. In the 181/183/74 area, liquid chemicals are manufactured. In the K-9 area, liquids and solids are mixed to produce flakes and powders. In the process materials handling area, or PMHA, flakes and powders are converted to package units such as pellets.

¹¹ Plasticizers are utilized in such products as telephone shells, hardhats, dash boards, bumpers and oil products.

¹² Employees are assigned to A, B, C or D shift.

dayshift approximately five shifts per month. The record clearly establishes that in each production area the employees have independently decided upon a rotation of the tasks to be performed on their particular shift.¹³

A. Assignment

1. Logbooks and Finishing Schedules

The record reflects that the four OEAs and three MEAs work only on weekdays on the dayshift, each beginning their shift between 6:00 a.m. and 7:30 a.m.¹⁴ As noted, production and maintenance technicians work every day on rotating 12-hour shifts, from 5:00 a.m. to 5:00 p.m. or 5:00 p.m. to 5:00 a.m. Thus, most of the dayshift technicians begin their shift without the presence of the OEAs and MEAs. Moreover, the record reveals that no OEAs or MEAs work on the night shift or on weekends.¹⁵

The schedule governing the production areas is handled by Materials Control Coordinator David Yost. The production schedule identifies the products to be made and the order in which they will be produced. This production schedule undergoes revision several times each week based on inventory levels of raw materials and unexpected equipment breakdowns.

A logbook or a shift data sheet is utilized in each production area. The logbook is used to convey or reinforce information both to technicians who work on the day shift when the OEA

¹³ Until approximately one year ago the technicians working on the D shift drew “tabs” to determine their tasks. Solids Manager Suek then advised the group that he wanted them to decide on a rotation system similar to those used by other areas and that if they did not do so, he would decide for them. There is no indication of OEA involvement in this matter.

¹⁴ Clawges and Foley work on weekdays from 7:30 a.m. to 3:30 p.m. Areford works on weekdays from 6 a.m. to 2:30 p.m. Swihart works from 7:00 a.m. to 5:00 p.m. on Mondays through Thursdays. All of the MEAs work ten-hour shifts on Mondays through Thursdays on dayshift.

¹⁵ Maintenance technicians may contact Facilities Operations Manager Unger or their respective MEAs and the production technicians may contact either their team leaders or their respective OEAs regarding problems or unusual occurrences which arise during the night shift or on the weekend. There is no requirement that the technician first contact their respective OEA or MEA when such circumstances arise. For example, while OEA Clawges, a 33-year employee, regularly receives a number of such calls in the 181/183/74 area, the record also reveals that in the K-9 and PMHA areas team leader Sirockman receives such calls for those areas, and that he has advised technicians to call him day or night if there is any question about a line opening procedure.

is present at the facility as well as to technicians working on the night shift and on weekends. This is one of the means used by the OEAs to keep up with the production schedule and to prioritize work. OEAs review the logbook to obtain information as to the status of production. Technicians consult the logbook for any special notations relating to production.

It appears that each area handles the use of the logbooks somewhat differently. In the 181/183/74 area, OEA Clawges includes in the logbook a list of products to be made at each kettle, or unit,¹⁶ as well as bulk orders and drumming orders.¹⁷ Clawges also prepares a “to-do” list of housekeeping type tasks in case there is no production work to be performed. The record reflects that the production technicians have their own system or “pecking order” for deciding which housekeeping tasks they will do.

In this area, the product known as triphenol phosphite, or TPP,¹⁸ is produced regularly. The Employer produces two grades of TPP, virgin TPP and recycled TPP. Clawges determines which grade of TPP will be produced based on the level of virgin phenol and recycled phenol in the Employer’s storage tank.¹⁹

Although Clawges spends approximately 65 percent of the workday in his office, the record indicates that production technicians call Clawges to report production or maintenance problems and to request assistance with troubleshooting. Clawges works on the production floor whenever his assistance is needed performing such tasks as clearing and draining lines. Clawges is also responsible for the Employer’s pond in which process water is collected for treatment before being released into the river. Clawges advises the utility technician as to which nutrients to add to the pond water and will determine the best method for correcting the

¹⁶ In the 181/183/74 area the units at which production technicians work are K-3, TPP, and K-10/K-60. The fifth technician works as the utility person.

¹⁷ Drumming involves storing product in drums. This function is performed by the utility technician on the shift.

¹⁸ TPP is an additive that makes plastic stronger.

¹⁹ Clawges is not required to consult with Materials Control Coordinator Yost as to the production of TPP.

Ph balance of the water. According to Clawges, the technician adds chemicals to the pond based on either the Employer's procedures for correcting the Ph levels or Clawges will advise the technician based on Clawges' years of experience.

At the South plant, OEA Swihart maintains an "operations logbook" in which he records, on a daily basis, which kilns will be operating, the preferred temperature and the rate or speed at which the products should be run. For example, an entry by Swihart in the operations logbook on August 22, 2006, shows that Swihart instructed that the Number 2 stripper should be run at 65 nonene, then that it should be increased to 70 once stabilized. The record reveals that Swihart determined that particular change to the production run rate based on input from the production technicians. In other instances, Swihart records notes in the operations logbook based on his experience. Frequently, Swihart obtains engineering or technical input before deciding what notes to include in the logbook. At times Swihart instructs technicians to run a product at a given rate or "best rate." In such cases the technician determines the best speed based on his or her experience. Swihart also includes notes of relevant information he has been advised of from O'Hearn or others such as a troubleshooting issue, customer complaint, or an anticipated or actual problem with a particular unit.

Swihart prepares the logbook for up to as much as three days in advance based on information as to when shipments are scheduled to leave the facility. In this way, Swihart leaves instructions for technicians who are working on a weekend when neither he nor O'Hearn is present at the facility. If all of the work in the logbook is completed, there are tasks which technicians know must be performed such as initialing off on reviews or performing tasks on a housekeeping list.

The record indicates that technicians often make entries in the logbook to document that a task has been completed and, like Swihart, they note tasks which need to be performed, such as painting.²⁰

²⁰ The production technicians also maintain a shift status book where they record work that has been completed.

Swihart spends approximately one hour per day gathering information on production jobs and approximately another one-half hour per day recording information in the logbook. In addition to working on the operations logbook, Swihart leads the morning meeting at which production issues and the production schedule are discussed.²¹ Before this meeting, Swihart consults with the MEA on duty.

Throughout the balance of his shift, Swihart spends 50 percent of his time on the production floor. Swihart consults with the production technicians to assist them in troubleshooting and with the SAP database.²² Based on information received from them, Swihart may decide to shut down a line or move employees to another production line.

In the K-9 area, team leader Sirockman, OEA Foley and the technicians use a logbook as a means to communicate back and forth. The logbook in this area does not contain instructions for specific units or stations. Rather, notes as to how a particular piece of equipment is running or certain housekeeping issues are recorded.²³

Four production technicians work in the K-9 area on dayshift when Foley is present. All four technicians work in the control room. Three technicians operate three different units from this location and the fourth technician operates a reactor which produces a separate product from that which is produced in the other three units. In addition, intermediate catalyst is produced in the K-9 area.²⁴ Foley monitors the levels of intermediate catalyst in inventory and will insert the production of a batch of intermediate catalyst on the production schedule.

²¹ Attending the morning meeting at the South plant are: Liquids Manager Bill Hayes, Facilities Operations Manager Lynn Unger, Technical Support Toby Gray, the MEA on duty, the South plant engineer and an intelligent automation or IA technician.

²² SAP is the Employer's real-time inventory tracking database. Swihart overrides computer input errors made by the production technicians.

²³ The production technicians in K-9 also maintain a shift status book where they record the work they were able to complete.

²⁴ Intermediate catalyst is an additive which is used only as an ingredient for other products made in the K-9 area.

OEA Foley ensures that the K-9 information is correctly entered in SAP. She performs this task in her office which is located in the Administration building. Foley also confirms that labels are printed for finished products and she delivers these to the production floor. If a problem occurs with the production schedule, Foley can advise Yost, who will then decide whether to revise the schedule. She also provides Yost with updates as to inventory levels of raw materials. In the case of an equipment failure, Foley can direct a technician to another task. If the shift is running ahead of schedule, Foley can request that a production technician perform a housekeeping task or lock out equipment for an upcoming maintenance activity.

In the PMHA area, OEA Areford generates a finishing schedule which identifies the product to be processed on each unit²⁵ and the type of package and shipping date for each product. The information on the finishing schedule comes from the production, shipping and staffing schedules. When a technician working in the PMHA area arrives at work, he will look at the finishing schedule to ascertain which product is to be run. Also, at each unit, a run sheet²⁶ is posted for each particular product. The run sheet also specifies the speed and amount of time needed for proper blending. When the Employer receives a PMHA customer order, Materials Control Coordinator Yost determines when the order can be filled and places the order on the production schedule. At that point, either Yost or Areford will print the run sheet for the product and place it with the schedule.

Areford spends approximately one and one-quarter hours each day generating the finishing schedule. He also spends one to two hours each day troubleshooting.²⁷ Areford inputs all of the information required for the SAP system and handles the delivery of raw

²⁵ At the time of the hearing six technicians were scheduled for each shift in the PMHA area because four units were operating. Two of the units require operation by two technicians.

²⁶ The run sheets are essentially recipes listing the ingredients, blending times and speeds. The record reveals that the run sheets are generated by the customer and are stored in the Employer's database. Areford or Yost simply prints out the run sheet when a particular product is listed on the production schedule.

²⁷ As previously noted, for certain problems, such as when line opening procedures are necessary, team leader Sirockman has advised the PMHA technicians to contact him for assistance.

materials to the facility for use in the PMHA area. Areford spends about 60 percent of his time in his office performing these duties.

As to the OEAs' authority to assign housekeeping duties, the record reveals that there are general clean up duties associated with all production jobs. Occasionally, an OEA will note a particular housekeeping task to be performed. More frequently, technicians consult a punch list of housekeeping tasks developed by a site-wide group²⁸ referred to as the 5S action list. Technicians at the North plant have been instructed by team leader Sirockman both orally and by email to work on the 5S list when they have time.

All of the MEAs and maintenance technicians report to Facilities Operations Manager Lynn Unger. It appears from the record²⁹ that MEAs utilize a logbook where the completed and upcoming assignments and work order numbers are listed.³⁰ Maintenance technicians take assignments from this log, or they consult with the MEA for the work they should perform.

A shift logbook is maintained by the shift mechanic during off hours.³¹ The MEA consults the shift log when he arrives at work to check which jobs were completed and whether any needed follow-up should be performed. Then, when the MEA meets with the maintenance technicians at 7:10 a.m., he distributes the work orders.³² The MEA then attends the morning meeting which is usually held at 8:15 a.m. with OEAs, team leaders and other management personnel. Depending upon what occurs there, the priority of assignments could change.

²⁸ The record does not reflect the participants in the site-wide group.

²⁹ The Employer called Lynn Unger and MEA David McDilda as witnesses to describe the duties and authorities of the MEAs.

³⁰ Unger has access to the logbook.

³¹ The maintenance technician working at night or on weekends is the designated shift mechanic. The shift mechanic is the only maintenance employee on duty at the facility at these times.

³² When an assignment is complete, the maintenance technician will return for additional assignments.

Maintenance requests for work come to the MEA by calls or contacts throughout the day. If, during the course of the day, calls for maintenance help come to the department,³³ the MEA will assess the problem before sending a maintenance technician. The determination as to how quickly a maintenance call must be addressed is based on how the equipment problems affect production. The record establishes that on Fridays, when none of the MEAs are present at the facility, the shift technician carries a radio and handles all calls and work orders for maintenance. The shift technician and the other maintenance employee on duty will jointly decide on which work orders they will perform during their shift.

There is some dispute as to whether MEAs are required to match skills of the individual maintenance technicians with the work to be performed. In this regard, McDilda and Unger testified during the instant hearing that McDilda considers, on a daily basis, the qualifications of the maintenance technicians when handing out assignments. McDilda and Unger further testified that approximately 50 percent of the time McDilda matches a maintenance technician's skills with the job to be performed.

In the initial representation case hearing, Unger testified that the assignment of work by an MEA was largely based on the availability of a maintenance technician and that 90 percent of the maintenance work was routine. At the hearing in this matter Unger attempted to reconcile his earlier testimony by drawing a distinction between work orders and other work assignments. Unger apparently claims that his earlier testimony that most work assignments were based on availability did not include the assignment of work coming to the MEA as a work order.

MEA McDilda could be faced with a situation where three assignments must be handled at one time. For instance, several maintenance technicians could be working together on a project such as building a platform when another maintenance technician is working on an isolated task. If a third problem such as a broken pump occurred McDilda would have to

³³ In case of a breakdown, production technicians often radio a maintenance technician or an Electrical and Instrumentation technician directly. If the incident occurs on an offshift, they will radio the shift technician. At times they will also direct a call to an OEA or MEA.

determine how to handle the repair of the third job. McDilda stated that he would consider whether the platform was at a point where one technician could be freed up or whether the pump repair was at a critical juncture. If no one could be freed up, McDilda might decide to handle the broken pump himself.

The Union presented maintenance technicians Don Alan Martin and Michael Bushko, a 19-year and 17-year employee, respectively, as witnesses. Martin and Bushko testified that they can perform 95 percent of all maintenance tasks, and that all of the maintenance technicians can perform the vast majority of all tasks, including projects involving a wide scope of tasks to be performed. However, certain maintenance technicians have a special skill, or niche. For instance, maintenance technician Ray Dement has machinist skills whereas John Price is a certified welder,³⁴ and Dennis Staggs has the most familiarity with boilers. Unger confirmed that Martin accurately listed the specialties of each maintenance technician, and further stated that the MEAs are also aware of each technician's particular skill.

2. Shutdowns

Each production area of the Employer's facility has two to three shutdowns for preventative maintenance per year. The timing and duration of the shutdowns are determined in January of each year by team leaders and higher management.³⁵ A preventative maintenance list of tasks has been developed over many years. Many of the tasks on this list must be completed during the shutdown, but certain tasks³⁶ can be cancelled by the OEAs if time does not permit their completion during the shutdown.

At some point early in the planning of the shutdowns, Unger meets with all of the MEAs and OEAs to discuss the schedule. Inasmuch as the Employer is not producing, and therefore

³⁴ Maintenance technicians Mike Bushko and Bob White are skilled mig welders.

³⁵ For shutdowns in the liquids area, Liquids Manager Hayes and Materials Control Coordinator Yost provide a timeline of the amount of time available for the shutdown.

³⁶ The tasks which the OEAs have the discretion to cancel are the more recently added tasks, some of which have been added to the list at the suggestion of one of the technicians.

not making money during a shutdown, it is imperative that the shutdowns end on the scheduled date. The OEAs and MEAs cannot decide to extend a shutdown for even one day but, as noted above, they can remove some of the less important maintenance tasks from the shutdown list.

As noted, the actual tasks performed during the preventative maintenance shutdown are determined by a PM program that prints out at the beginning of each year. Generally, the team leader, OEA and MEA review this list and can make additions, if any are necessary. For shutdowns in the 181/183/74 area, OEA Clawges and MEA Trickett consult with each other to plan the work they believe can be completed within the allotted time frame. Liquids Manager Hayes must approve their plan.

In the K-9 area, OEA Foley prepares a schedule of tasks that production technicians can perform during the period based on information from MEA McDilda as to the maintenance work in the area during the shutdown. In this area, one of the reactors generally continues to operate during the shutdown. Therefore, the production technician scheduled to run that reactor according to the regular shift work rotation will continue to do so. The other three production technicians will decide among themselves which tasks they will perform unless they are needed to assist the maintenance technicians on one or more of the shutdown assignments.

In the PMHA area each of the technicians chooses work from the template.³⁷ During a shutdown at the South plant, OEA Swihart writes special tasks for production technicians to perform when they are not assigned to help maintenance technicians to perform preventative maintenance functions.

The MEAs usually work with the maintenance technicians during a shutdown. The record reveals that if the MEA is absent from the plant during a shutdown, a maintenance technician would be asked to step in and direct the work during the shutdown.³⁸

³⁷ The template is a list of tasks to be completed on each shift. The template was created by team leader Sirockman when he was an OEA prior to June 2005.

³⁸ Facilities Operations Manager Unger testified that a maintenance technician could direct the work which had been "laid out" for him. The Employer did not offer any explanation as to how this differed from the MEAs' use of the PM program in directing the tasks to be performed by the maintenance technicians.

Aside from the shutdowns for preventative maintenance, there are daily shutdowns due to equipment failure. Before maintenance can be performed the equipment must be locked out. Every lock out of machinery must be effected according to the Hazardous Energy Control Plan (“HECP”), a written procedure maintained by the Employer.³⁹ When this type of shutdown occurs, the OEA and MEA prints out the applicable HECP for the technicians who then go about locking out belts and motors and performing other tasks to shut down the equipment. Also, if the production schedule is such that a piece of equipment can be idled for a few days, the OEA will consult with the MEA as to whether maintenance technicians are available to perform preventative maintenance on the equipment. At the South plant, this type of situation would not result in production technicians being moved from their daily assignment because it appears that they are responsible for more than one piece of equipment. If one piece of equipment was idled, the production technician would still be responsible for other equipment.

B. Responsible Direction

1. SOPs/HECPs/MOCs⁴⁰

A standard operating procedure, or SOP, is the procedure to be followed by the technicians whenever they are making a particular product. Revisions in the SOP change the manner in which production is performed.

The Employer’s SOPs are stored in its Electronic Data Management System or EDMS where they can be accessed by all employees. It appears that the EDMS system requires that one person be the designated “owner” of the SOPs in each area such that the owner is the only

³⁹ As noted infra, HECPs are written by technicians as well as by OEAs, and they are reviewed by the Employer’s Site Safety Specialist.

⁴⁰ While the facts relating to SOPs/HECPs/MOCs are presented herein for organizational purposes, I note that the Employer apparently argues that the preparation of these documents constitutes both assignment and responsible direction.

individual who can revise and update the SOPs. OEA Clawges is the designated owner of the SOPs in the 181/183/74 area, and thus can give approval to an SOP.⁴¹

The record reveals that Clawges normally sends all the SOPs he works on to the 181/183/74 engineer for review.⁴² Clawges will modify an SOP based on either his knowledge of a proper procedure to be followed or the suggestions of production technicians. If an SOP prepared by Clawges included an incorrect temperature or percent which caused a technician to incorrectly make a product, the Employer would hold Clawges responsible for his own error.

As of the hearing in this matter, team leader Sirockman, OEA Foley and the area engineer in K-9 were involved in updating the SOP for a piece of equipment in the K-9 area because training on that piece of equipment was to be scheduled for February or March 2007.

The management of change, or MOC, form is used whenever a change is to be made to equipment. The MOC affects the ultimate configuration of the production equipment. It appears from the record that MOCs are issued and modified by one of the Employer's process engineers, and that OEAs and MEAs cannot perform this function on their own. MEA McDilda testified that the process engineer is responsible for issuing and modifying MOCs. McDilda had more involvement in this procedure when the process engineer position was vacant than his current involvement which is essentially to provide input to the engineer.

The record contains a sample of a MOC form which lists OEA Clawges as the originator. However, the record reveals that production and maintenance technicians also have the ability to originate MOCs. Whether initiated by a technician or an OEA, the MOC paperwork must be forwarded to an engineer for review. After review by an engineer, the MOC must be signed off on by maintenance personnel.

⁴¹ Likewise, OEA Areford is the designated owner of the SOPs in the PMHA area and is responsible for generating new SOPs and continually reviewing existing SOPs.

⁴² It appears that SOPs are signed off on by the OEA after an engineer has reviewed the document.

A hazardous energy control procedure, or HECp,⁴³ is the document which sets forth the step-by-step lockout procedure to be followed when any piece of equipment needs to be repaired. By following the HECp, the equipment is deenergized and thereby made safe to work on. The HECps are also stored on the Employer's EDMS so that technicians can access them when needed. When an OEA writes a new HECp or modifies an existing HECp,⁴⁴ he or she must sign off on the document. With respect to the nature of the authority to write HECps, the record reveals that production technicians also write and modify HECps. However, whereas OEAs alone sign the document, production technicians must have it countersigned by a maintenance technician. Moreover, the Employer's site safety specialist reviews most if not all of the HECps that are written on site. Any employee who writes a HECp which, due to negligence, causes injury or harm to another employee is responsible for the consequence of his or her negligence.

The Employer contends that by drafting standard operating procedures (SOPs), management of change (MOC) forms and hazardous energy control plans (HECPs), the OEAs and MEAs set forth certain processes which must be followed, and this effectively constitutes direction of the work of production and maintenance technicians.⁴⁵ This conduct also establishes, according to the Employer, the requisite accountability because the creator of the HECp is responsible if something goes wrong. In addition, the possibility of Employer liability exists under the Occupational Safety and Health Act.⁴⁶

⁴³ HECps are also referred to in the record as hazardous energy control plans.

⁴⁴ It appears from the record that one of the OEAs' responsibilities is to conduct an annual review of each HECp used in their particular area.

⁴⁵ The record establishes that MEAs do not draft SOPs or HECps, and have only limited involvement with MOCs.

⁴⁶ The Employer makes no similar argument with respect to drafting SOPs and MOCs.

2. Accountability

Ideally, OEAs and MEAs are to be evaluated annually. The performance evaluation of the OEAs and MEAs does not reflect the performance of the area he or she oversees. There is no incentive compensation system for OEAs or MEAs and wage increases have always been across the board increases. When completing MEA performance evaluations,⁴⁷ Unger generally comments on the MEA's leadership abilities,⁴⁸ whereas he only comments on this characteristic with maintenance technicians when they have been involved in a special project.

The record establishes that OEAs and MEAs are not held responsible for the performance, or lack thereof, of technicians. Unger testified both at the unit clarification hearing and at the underlying representation case hearing that when two maintenance technicians⁴⁹ failed to perform assigned duties, Unger addressed the issue directly with the technicians. In that case, Unger spoke with MEA Trickett in order to adequately investigate the matter. According to Unger, Trickett was not held responsible for the technicians' conduct. In this proceeding, Unger testified that if Trickett had observed the behavior of the two technicians and allowed it to continue, Trickett might have been disciplined. Likewise, if Unger discovered that an MEA failed to assign work on a timely basis, the MEA would be counseled or disciplined for this deficiency in the performance of his own job.

The record also indicates that the Employer utilizes outside trucking firms to load and off load product at the facility. In some areas, if the product is not handled within two hours a

⁴⁷ Unger admitted that evaluations were previously completed annually, but none have been completed by him in the last 2 to 3 years.

⁴⁸ There is no reference in the record to OEAs being evaluated on their leadership abilities.

⁴⁹ The situation involved the oral reminders issued by Unger to maintenance technicians Fred Luckey and Gary Parenti. This matter was discussed at page 19 of my Decision and Direction of Election. As noted, the discipline issued was a result of Unger's personal observation that the two technicians did not progress as expected on their assignments. Unger spoke with MEA Trickett and others to investigate the matter. As noted by Unger in the representation case hearing, Trickett did not report the incident and he had no role in the decision to discipline the two technicians in that MEAs have no authority to discipline employees or influence the process. Unger also testified that "scolding" or "chewing out" technicians is outside the MEAs' realm of authority.

demurrage charge of between \$40 to \$70 per hour is charged to the Employer. In the 181/183/74 area, OEA Clawges determines whether to pause a production line in order to send technicians to assist in the loading or unloading of trucks so as to avoid a demurrage charge.

At the South plant, product is delivered by rail car. It appears that the rail cars can be left at the facility for a number of days before demurrage charges accrue. If OEA Swihart notices that a car has been at the facility for some time, he will note in the logbook, in accordance with the Employer's first in, first out procedure that the car is to be unloaded next. In any event, there is no evidence in the record that any OEA, MEA or other employee has ever been disciplined for a demurrage charge.

Inasmuch as no production occurs during a shutdown, it is imperative to the Employer that each shutdown be completed on time. As to whether OEAs and MEAs would be responsible for the untimely completion of a shutdown, OEA Clawges believes he would have to answer if a shutdown ran over schedule more than once. However, OEA Swihart testified that he has never been advised as to who would be held responsible if a shutdown ran over. Moreover, according to OEA Swihart, a shutdown has never run over the time allotted; and there is no evidence in the record to establish that OEAs and MEAs would be held responsible for such an occurrence.

The record indicates that 12 or more years ago, when employed by one of the predecessor employers, two MEAs were removed from their positions because they did not have the personality to enable them to work with the technicians and they lacked the ability to provide timely service to the in-plant customers.

The record also contains evidence regarding the reassignment of one OEA by the Employer involved herein. In that instance, then-PMHA area OEA Randy Moore was off work prior to 2004 due to certain medical problems. When he returned to work, he worked as a PMHA technician on dayshift for a period of time. When the Employer determined that it needed to fill the OEA position in the PMHA area permanently, Moore advised the Employer

that he could not safely perform the OEA job and the Employer changed Areford's OEA status from acting to permanent.

As noted above, according to the Employer, the creator of the HECs is accountable if another employee is injured as a result of following the instructions on the HEC. In addition, the possibility of Employer liability exists under the Occupational Safety and Health Act.

C. Substitution for Team Leaders

OEA Swihart testified that he does not consider himself to be a substitute for team leader O'Hearn when O'Hearn is out of the plant. Moreover, Swihart does not consider himself to have heightened authority when O'Hearn is not present. In fact, Swihart assumes that Liquids Manager Hayes handles O'Hearn's job when O'Hearn is not present.

Although OEA Clawges testified that he substitutes for team leader Thorn when Thorn is out of the plant,⁵⁰ Thorn testified that both Clawges and engineer Terry Ryan are responsible for the area in his absence. Clawges acknowledged that during such periods, Clawges performs his own job and will take on some tasks that Thorn normally performs. Specifically, Clawges will check the overtime list when determining whether to cover certain jobs. He also conducts the team meetings on Thursday afternoon to review production with the shift that is coming back after seven days off.

Team Leader Sirockman testified that OEA Foley "watches" the K-9 area in his absence.⁵¹ Sirockman stated that in his absence Foley would participate in coordinating with the MEAs on projects and identifying safety initiatives. In the PMHA area, both OEA Areford and Solids Manager Steve Suek substitute for Sirockman when he is not at the facility.

When Unger is absent, MEA McDilda handles certain aspects of Unger's job such as calling employees out from the overtime list if necessary and meeting with vendors. The record

⁵⁰ The record reflects that the longest amount of time that Thorn is out of the plant is two weeks.

⁵¹ Sirockman gets six weeks of vacation each year.

does not indicate that the OEAs and MEAs possess all of the authority of a team leader during periods when they fulfill some of their duties.

III. ANALYSIS

Before analyzing the authority of the OEAs and MEAs to assign and responsibly to direct with independent judgment, I will review the requirements for establishing supervisory status.

Section 2(11) of the Act defines the term supervisor as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In considering whether the individuals at issue here possess any of the supervisory authority set forth in Section 2(11) of the Act, I am mindful that in enacting this section of the Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” Chicago Metallic Corp., 273 NLRB 1677, 1688 (1985). Thus, the ability to give “some instructions or minor orders to other employees” does not confer supervisory status. *Id.* at 1689. Indeed, such “minor supervisory duties” should not be used to deprive such individuals of the benefits of the Act. NLRB v. Bell Aerospace Co., 416 U.S. 267, 280-281 (1974), quoting Sen. Rep. No. 105, 80th Cong. 1st Sess., at 4. In this regard, I note that the Board has frequently warned against construing supervisory status too broadly because an individual deemed to be a supervisor loses the protection of the Act. See, e.g., Vencor Hospital – Los Angeles, 328 NLRB 1136, 1138 (1999); Bozeman Deaconess Hospital, 322 NLRB 1107, 1114 (1997).

The burden of proving supervisory status rests on the party asserting that such status exists. NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 711-712 (2001); Arlington

Masonry Supply, Inc., 339 NLRB 817, 818 (2003); Dean & Deluca New York, Inc., 338 NLRB 1046, 1047 (2003). As a general matter, I note that for a party to satisfy the burden of proving supervisory status, it must do so by a preponderance of the credible evidence. Dean & Deluca, supra at 1047; Star Trek: The Experience, 334 NLRB 246, 251 (2001). The preponderance of the evidence standard requires the trier of fact “to believe that the existence of a fact is more probable than its non-existence before [he] may find in favor of the party who has the burden to persuade the [trier] of the fact’s existence.” In re Winship, 397 U.S. 358, 371-372 (1970) (Harlan, J., concurring). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. See Williamette Industries, Inc., 336 NLRB 743 (2001); Michigan Masonic Home, 332 NLRB 1409 (2000). Moreover, “[w]henver the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” Phelps Community Medical Center, 295 NLRB 486, 490 (1989). Consequently, mere inferences or conclusionary statements without detailed specific evidence of independent judgment are insufficient to establish supervisory status. Sears, Roebuck & Co., 304 NLRB 193 (1991).

As previously noted, the Board recently revisited the issue of supervisory status in Oakwood Healthcare, Inc., 348 NLRB No. 37, and two companion cases, Croft Metals, Inc., 348 NLRB No. 38 and Golden Crest Healthcare Center, 348 NLRB No. 39, all of which issued on September 29, 2006. In these decisions, the Board refined its analysis for assessing supervisory status in light of the Supreme Court’s decision in Kentucky River, supra. In Oakwood, the Board addressed the Supreme Court’s rejection of the Board’s definition of Section 2(11) in the healthcare industry as being overly narrow, by adopting “definitions for the terms ‘assign,’ ‘responsibly to direct,’ and ‘independent judgment’ as those terms are used in Section 2(11) of the Act.” Oakwood, supra, slip op. at 3.

According to the Board's recent decision in Oakwood Healthcare, Inc., assign refers to the act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period) or giving significant overall duties, i.e. tasks, to an employee. In Oakwood, this encompassed assigning nurses and aides to particular patients. Assignment to a department or to a certain shift or to significant overall tasks would also qualify as assign. However, choosing the order in which an employee performs discrete tasks or an ad hoc instruction does not constitute assigning within the meaning of Section 2(11). Oakwood, supra, slip op. at 4.

In Croft Metals, Inc., where the Board applied the Oakwood analysis to an industrial setting, there was insufficient evidence that lead persons' responsibilities met the definition of assign. Lead persons did not prepare posted work schedules for employees, appoint employees to production lines, departments, shifts or any overtime periods or give significant overall duties to employees. Lead persons generally worked alongside regular line or crew members who performed the same task or job on the line or in their department every day. In Croft Metals, lead persons had no choice or flexibility concerning fill-in personnel. They had no control over whether or for how long replacements would remain. Frequently, lead persons themselves just filled in "to pick up the slack." Lead persons sometimes switched tasks among employees to finish projects, but the frequency and the factors taken into account when switching the tasks were not in the record. The occasional switching of tasks by lead persons did not implicate the authority to assign employees, as that term is described in Oakwood, because the activity did not constitute the "designation of significant overall duties to an employee." Oakwood, supra, slip op. at 4.

In Golden Crest Healthcare Center, charge nurses did not have the authority to assign employees because the record established that they did not have the authority to order CNAs to go home early, to assign first floor CNAs to work on the second floor, to order CNAs to stay past the end of the shift and to mandate CNAs to come in to work from home. Charge nurses did

“request” these latter two things, but the employer did not establish the authority of the charge nurses to independently mandate or require CNAs to stay past their shifts or to come in from home. The record in Golden Crest also revealed that charge nurses did not alter CNA section assignments to balance the work load. CNAs often decided among themselves how to balance the work load and there was no evidence that the charge nurse could require alteration of section assignments. In addition, the Board said that reassignments to balance only the quantity of work without regard to individualized assessments of CNAs’ skills in relation to residents’ needs or other factors are routine and do not require independent judgment.

Applying the Board’s analysis set forth in Oakwood, Golden Crest and Croft Metals, it is clear that the OEAs and MEAs in this case do not assign other employees as that term is used in Section 2(11) of the Act.⁵² It is undisputed that the OEAs and MEAs have no role in designating the areas where production and maintenance employees work. Likewise, they have no role in determining the shift worked by any of the employees⁵³ and they cannot mandate overtime.⁵⁴ Finally, the record is clear that in each area, the employees on the particular shift have collectively decided upon a rotation of the primary duties to be performed. The OEAs do not prepare or change the production schedule which identifies the work to be performed in each production area.

⁵² In its brief, the Employer improperly conflates assignment with responsible direction. In Oakwood and its companion cases, the Board specifically noted the distinction between assignment and responsible direction of work.

⁵³ As noted herein, the OEAs and MEAs work with rotating shift groupings of approximately five production technicians and three or four maintenance technicians, respectively. For each grouping of technicians, working on dayshift occurs about four or five times each month. Because MEAs work on Mondays through Thursdays on dayshift, they are physically present during 4 of the 14 shifts per week, or less than 30 percent of the time. OEAs are physically present during five shifts, only a slightly larger percentage of the time.

⁵⁴ As noted in my Decision and Direction of Election in the underlying representation case, the Employer has a call-out procedure whereby off duty employees are called first in seniority order to work overtime. However, no employee can be mandated to work overtime. If neither the team leader nor the OEA is present, a production technician will make calls to employees utilizing the call-out list.

The Employer contends that OEAs and MEAs, whom it collectively calls EAs, assign work “of greater significance and involving far more discretion than the ‘restocking of shelves’ discussed in Oakwood.” The Employer cites assignment of maintenance technicians to repair a significant piece of equipment, assigning a crew of maintenance technicians to participate in a project such as building a platform and assigning various overall tasks to a shift of production technicians as reflected in the daily logbook entries prepared by OEA Swihart or the periodic direction by OEA Foley to produce intermediate catalyst. The Employer also contends that EAs reassign technicians to other work, including non-production work as the EAs see fit.⁵⁵

In this regard, as to assigning a maintenance technician to repair equipment, it continues to appear that any such assignment would be based on availability inasmuch as the record reflects that all of the maintenance technicians can perform the vast majority of work asked of them. The assignment of a “crew” to a project could only be done when there was little other work to be performed inasmuch as there are only three or four maintenance technicians on duty on dayshift. The recording of tasks on a logbook or finishing schedule is primarily a method of communicating to the technicians as a group, and is not a way of assigning particular tasks to an individual technician. In addition, many of Swihart’s notations in the South plant logbook are recorded as a result of input from technicians or to communicate information to them that he has received from the team leader or other sources.

⁵⁵ In the brief filed on behalf of the Employer in the underlying representation case, the Employer stated that “at most, the MEAs assign work on a routine basis without using the requisite independent judgment.” The Employer also said since most of the maintenance technicians can perform 90 percent of the job tasks which may arise in the workplace, the MEAs primarily are required to do no more than look at the availability of technicians to determine who should be asked to complete specific tasks. The ability to mete out work assignments, according to the Employer in that proceeding, is merely routine and exercised without independent judgment. The Employer maintained that the absence of supervisory authority to assign is further proven by the fact that maintenance technicians frequently play the same role as that played by the MEAs in passing out work.

As to logbooks, the Employer argued that they provide a general listing of tasks that need to be completed and that OEAs “in no way” assign any of the tasks listed to any specific employee. The Employer further noted that all priorities in operations are dictated by the production schedule prepared by Materials Control Coordinator Yost.

Foley's determination as to the manufacture of intermediate catalyst, which is necessary for production on the K-9 area, is based on the amount of this material in stock, and is not an assignment made with independent judgment or substantial discretion. Similarly, Clawges' determination as to which type of TPP to manufacture is based on the amounts of virgin or recycled phenol in storage.

As to the assignment of housekeeping tasks, the record establishes that most such tasks are on a site-wide housekeeping list developed at the direction of the Employer. The fact that the OEAs or MEAs may sometimes adjust the order of the tasks to be performed or may direct a technician to a housekeeping duty or to the site-wide housekeeping list when there is no production work to be performed is the type of instruction that does not constitute assignment. Moreover, in at least the PMHA and K-9 areas, team leader Sirockman has notified production technicians that they are to work on the list when they are able to do so. This indicates that when OEA Foley directs the technicians to perform housekeeping tasks she is merely reminding the technicians in the K-9 area of Sirockman's instructions.

With respect to supervisory authority relating to the responsible direction of work, the Board made clear that the phrase "responsibly to direct" is not meant to include minor supervisory functions performed by lead employees, straw bosses and setup men. The phrase is not, however, limited to department heads, but arises if a person has men under him and if that person decides what jobs will be undertaken next or who shall do it, provided that the direction is both responsible and is carried out with independent judgment. Oakwood, supra, slip op. at 6.

For direction to be responsible, the individual asserted to be a supervisor must be accountable/answerable for the performance of the task by the other employee, such that some adverse consequence follows if the tasks are not performed properly. In directing others, the putative supervisor will be carrying out the interests of management, disregarding, if necessary, employees' contrary interests. Id. at 7. At footnote 38 of Oakwood, the Board stated that, for an

individual responsibly to direct with independent judgment, the individual will need to exercise significant discretion and judgment in directing others.

In Croft Metals, lead persons were “accountable” for purposes of responsible direction because they managed teams, corrected improper performance, moved employees when necessary to do different tasks and made decisions about the order of work so as to meet management-targeted production goals, and they were disciplined when the employees assigned to them inadequately performed their jobs. However, there the responsible direction was not exercised with independent judgment. In Croft Metals, the lead persons followed pre-established delivery schedules, employed standard loading patterns and the employees performed repetitive tasks requiring minimal guidance. Thus, the Board said the degree of direction did not rise above the routine or clerical.

The record in this matter establishes that the OEAs and MEAs do not responsibly direct the performance of the production and maintenance technicians. At the hearing, and in its brief the Employer appears to argue that all of the determinations regarding the work to be accomplished during a shutdown leads to the assignment of work, and therefore the OEAs and MEAs responsibly direct the technicians. The Employer also appears to argue that the OEAs’ and MEAs’ involvement with SOPs, HECPs and MOCs constitute both assignment and responsible direction. Finally, the Employer asserts that OEAs and MEAs check on and correct the work of technicians.

The OEAs and MEAs do not determine when shutdowns will be scheduled or, for the most part, what work will be performed. The OEAs and MEAs may not extend the shutdown. OEAs do list housekeeping type tasks that can be performed during the shutdown, but the technicians choose the tasks they prefer to perform. These tasks will be put on hold if a maintenance technician needs assistance from a production technician to complete a shutdown task.

As to the SOPs, HECPs and MOCs, I conclude that any involvement with such documents does not amount to either assignment or responsible direction of the technicians.⁵⁶ Initially, these documents simply reflect written procedures to enable completion of a task in a certain way or the configuration of equipment. As to each of these documents, the record reflects the participation and review by supervisory and/or engineering employees before they are finalized. In addition, it is undisputed that technicians have the authority to initiate and modify HECPs and MOCs. The fact that HECPs and MOCs are prepared by employees who are admittedly nonsupervisory raises the initial question as to whether the preparation of such documents is evidence of supervisory authority to assign or responsibly direct. This combined with the fact that others are involved in the approval and signing off on the documents establishes that the preparation of SOPs, HECPs and MOCs does not constitute either assignment or responsible direction.

Moreover, contrary to the Employer's assertions of accountability at the hearing and in its brief, the record establishes that OEAs are not held accountable in accordance with Oakwood, Golden Crest and Croft Metals. The Employer contends that an OEA would be held accountable if an individual technician was injured as a result of following the instructions in a HECP issued by the OEA, and that an OEA's actions could result in liability to the Employer under the Occupational Safety and Health Act if the HECP fails to comply with safety standards.⁵⁷

Even assuming that the OEAs' involvement with HECPs established that they have the authority to direct, OEAs are not accountable for the technicians' performance when they are

⁵⁶ In its brief in the underlying representation case the Employer contended that any claim of supervisory status based on signing off on HECPs is unfounded. In support of this assertion the Employer noted that a production technician can also sign off on HECPs with assistance from another technician, technicians are not required to obtain approval of an OEA, MEA or team leader before signing off on a HECP and, unlike team leaders, OEAs have no authority to execute confined space entry permits which must be signed before technicians can work in confined spaces.

⁵⁷ As noted by the Board at footnote 11 of Golden Crest, the issue of accountability only becomes relevant when authority to direct has, unlike here, been established.

utilizing a HECP. Rather, the OEA would be accountable only for his or her own action of recording incorrect information on the HECP. In Golden Crest, the record established that the charge nurses gave direction to CNAs, but they were not accountable for CNA performance. There was no showing of any positive or negative consequence to any charge nurse in that case, and there was no evidence that charge nurses were informed of any material consequences that might result from their direction of CNAs. The employer relied on evaluation forms where charge nurses were rated on directing CNAs, but this was insufficient where it could not be established that any action had been or might be taken as a result of a charge nurse's evaluation on this factor. In addition, the employer did not award merit increases or bonuses. Golden Crest, supra, slip op. at 5.

According to the Board, accountability requires evidence of actual or prospective consequences, but prospective consequence must be more than a merely paper showing that such a prospect exists. The mere fact that charge nurses were rated on directing CNAs did not establish that any adverse consequences could or would befall the charge nurse as a result of the rating. Therefore, the Board found that the charge nurses had no authority responsibly to direct the CNAs. *Id.*, slip op. at 5.

Regarding the ability of OEAs and MEAs to correct the work of the technicians, the record establishes that one of the functions of the OEAs is to review entries in SAP and make any necessary corrections. Also, OEAs and MEAs will informally talk to or coach technicians regarding work issues and will assist them in identifying production or maintenance problems. The Employer asserts that OEAs may bring performance deficiencies of technicians to the attention of the team leaders or managers, and that Facilities Operations Manager Unger actively seeks MEA input and acts on the input he receives. As noted by the Employer in its brief in the underlying representation case, OEAs and MEAs, like any other production or maintenance employee, can provide information to management regarding the performance of other employees, and there is no evidence that any recommendations would be relied upon by

management in any way different than reports from other non-supervisory employees. For example, in the case of maintenance technicians Luckey and Parenti discussed supra, it is clear that MEA Trickett had no role in the outcome of Unger's observation of the deficiency in their performance. Moreover, as noted in my Decision and Direction of Election in the underlying representation case, in 2006 when OEA Clawges attempted to act as if he had the authority to responsibly direct technicians by sending an email to technicians regarding their responsibility for unaccounted-for downtime, team leader Thorn sent a message to the same group about two hours later apparently disavowing Clawges' statements. The next day Thorn personally advised Clawges that Clawges could not send such e-mails in the future without Thorn's authorization.

There is likewise no showing that OEAs or MEAs are otherwise accountable for the technicians' performance. To the contrary, the record clearly establishes that OEAs and MEAs are not evaluated on or held responsible in any way for the performance of the technicians.⁵⁸ In addition, if a technician fails to perform his job, even if he disregards instructions given by the MEA or OEA, the OEA or MEA is not responsible for the failure, and the team leader would address the deficiency directly with the technician.

In Oakwood, the Board made clear that both of the Section 2(11) indicia of "assign" and "responsibly to direct" must be exercised with independent judgment. The Board also said that to exercise independent judgment an individual must, at a minimum, act, or effectively recommend action, free of the control of others and with the ability to form an opinion or evaluation by discerning and comparing data. In addition, the exercise of independent judgment must be "not of a merely routine or clerical nature." If there is only one obvious and self-evident choice, then the assignment is routine or clerical in nature.

⁵⁸ Unger's reference to the leadership abilities of certain MEAs in their performance evaluations does not establish that they are evaluated based on the performance of the maintenance technicians. In addition, the Employer's argument that accountability is established because EAs have been removed from their positions in the past based on performance is unfounded. The only example of an OEA being replaced while employed by this Employer occurred because the OEA informed the Employer that he could not safely perform the duties any longer due to certain medical issues.

When distributing work to the maintenance technicians, the MEA is aware that the vast majority of work can be assigned to any technicians on the shift. In cases where a specialized skill is needed, the record reflects that many of the maintenance technicians have special expertise in a certain area. For instance, there appears to be one certified welder among the maintenance technicians. Likewise, there is one maintenance technician who is particularly skilled in working on boilers, one or two technicians who are particularly skilled in mig welding and one technician who is a skilled machinist. In these circumstances, the MEAs' assignment based on skills does not evidence independent judgment. Rather, it shows that the assignment is routine or clerical in nature as there is only one obvious or self-evident choice.

In Croft Metals, the lead persons alleged to be supervisors followed a pre-established delivery schedule, employed standard loading patterns and the employees involved performed repetitive tasks requiring minimal guidance. Here again, the Board said the degree of direction in Croft Metals did not rise above the routine or clerical.

Applying this reasoning to the OEA's cancellation of a task during a shutdown, it is clear that such a cancellation does not establish independent judgment. OEAs cancel tasks only to ensure that the shutdown ends on time, and they may only cancel discretionary tasks.

For those who fill in or rotate as a supervisor, the Board in Oakwood said that to be a supervisor within the meaning of the Act, they must spend a regular and substantial portion of their work time in the supervisory position. "Regular" means according to a pattern or schedule. "Substantial" means that the individual must serve in the supervisory role for at least 10 to 15 percent of their total work time. Here the OEAs and MEAs perform some of the duties of their team leaders, but as I noted in the Decision and Direction of Election in this matter, the record does not demonstrate that they possess the same authorities as the team leaders.⁵⁹ Rather, a

⁵⁹ While the burden of proving this factor shifted from the Union in that proceeding to the Employer in this proceeding, the Employer nevertheless failed to provide detailed specific evidence to establish that during the times they "fill in" for their team leaders the OEAs and MEAs possess and independently exercise any of the supervisory duties of these positions.

member of higher management, such as Solids Manager Suek in the PMHA area, Liquids Manager Hayes at the South plant, or engineer Terry Ryan in the 181/183/74 area will assist in the area's oversight during the absence of a team leader. The record reflects that OEAs and MEAs substitute during their team leaders' vacation and other unscheduled occasions. In Rhode Island Hospital, 313 NLRB 343, 348 (1993), cited in Oakwood, the Board stated even if the lead printer possessed and exercised the supervisory authority of the department manager for whom he was substituting, the "sporadic assumption of supervisory duties, e.g., during annual vacation periods or on other unscheduled occasions, is not sufficient to establish supervisory authority." Assuming, contrary to my findings herein, that the OEAs and MEAs possess supervisory authority when they are filling in for their team leaders, the times when they perform this duty are not regular, and therefore would be insufficient to constitute supervisory authority within the meaning of Section 2(11) of the Act.

Accordingly, based on the above record and as a whole, I conclude that the Employer has not met its burden of establishing that the OEAs and MEAs are supervisors within the meaning of Section 2(11) of the Act.⁶⁰

⁶⁰ At footnote 4 of its brief, the Employer asserts that if the OEAs and MEAs are not found to be supervisors, "it then seems certain that they do not share a community of interest with the technicians." The community of interest issue is not a litigable issue in this proceeding, especially where, as here, the parties stipulated in the underlying representation case that if the OEAs and MEAs were found to be non-supervisory employees, they would appropriately be included in the proposed unit.

The Employer also makes inaccurate assertions at pages 3 and 17 of its brief. On page 3 of its brief, the Employer states that I discounted the EAs' supervisory authority in the underlying Decision and Direction of Election in this matter because the EAs were themselves subject to supervision from their team leaders. I did not make this statement and the determination of the OEAs' and MEAs' status as non-supervisory employees, consistent with the arguments advanced by the Employer in that proceeding, was based on a consideration of all of the record evidence. The Employer also asserts, at page 17 of its brief, that the fact that the EAs substitute for team leaders to the extent they do is sufficient in and of itself to qualify the EAs as statutory supervisors, but that this issue was not addressed in the Decision and Direction of Election. Contrary to the Employer's assertion, I discussed the OEAs and MEAs substitution for team leaders at page 22 of the Decision and Direction of Election and I concluded there, as I have in the instant proceeding, that the record evidence does not establish that the OEAs and MEAs possess or exercise the same authorities as the team leaders when they assist in overseeing an area in the team leaders' absence.

IV. FINDINGS AND CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter.
3. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

Accordingly, for the reasons set forth above, I shall dismiss the petition in the instant case.

V. ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001.⁶¹ This request

⁶¹ A request for review may be filed electronically with the Board in Washington, D.C. The requirements and guidelines concerning such electronic filings may be found in the related attachment supplied with the Regional Office's initial correspondence and at the National Labor Relations Board's website, www.nlrb.gov, under "E-Gov."

must be received by the Board in Washington by 5 p.m., EST (EDT), on April 16, 2007. The request may **not** be filed by facsimile.

Dated: April 2, 2007

/s/Gerald Kobell

Gerald Kobell, Regional Director

NATIONAL LABOR RELATIONS BOARD

Region Six

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